

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OPERATIVE PLASTERERS' & CEMENT)	
MASONS' INTERNATIONAL ASSOCIATION)	
LOCAL 200, AFL-CIO AND OPERATIVE)	
PLASTERERS' & CEMENT MASONS')	Case Nos.: 21-CD-00659
INTERNATIONAL ASSOCIATION, AFL-CIO)	21-CD-00660
AND STANDARD DRYWALL, INC. AND)	21-CD-00661
SOUTWEST REGIONAL COUNCIL OF)	21-CD-00673
CARPENTERS, UNITED BROTHERHOOD OF)	
CARPENTERS AND JOINERS OF AMERICA)	
(STANDARD DRYWALL, INC.))	
)	
)	
)	

**OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL
ASSOCIATION'S OPPOSITION TO STANDARD DRYWALL'S REQUEST FOR
REVIEW**

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Dated: February 23, 2015

OPPOSITION TO REQUEST FOR REVIEW

On January 6, 2015, Standard Drywall, Inc. (“SDI”), filed a request for review of the General Counsel’s decision affirming the Regional Director’s compliance determination. Respondent Operative Plasterers’ and Cement Masons’ International Association (“OPCMIA”) hereby files its opposition to the Request for Review. *See, e.g., Hanson Aggregates BMC, Inc., Cases 04-CA-033330 et al., 2013 WL 1154233, *2 n.3 (N.L.R.B. March 19, 2013).*

In her compliance determination, the Regional Director found that SDI was entitled to reasonable attorneys’ fees for certain specifically identified litigation. The Regional Director also found that OPCMIA should post the Board’s remedial notice, but not on the OPCMIA website. The OPCMIA has complied with the physical posting requirements. SDI appealed the Regional Director’s determination, arguing that it is entitled to fees not only for the identified litigation but also for proceedings before the NLRB and a variety of collateral proceedings, and further arguing that OPCMIA should post the notice on its website in addition to all of the other locations. On October 2, 2014, OPCMIA filed a response to SDI’s appeal with the General Counsel.

On December 24, 2014, the General Counsel affirmed the Regional Director’s determination. In a substantive decision, he found that the Regional Director had properly considered all of the arguments raised by SDI and had correctly determined the scope of attorneys’ fees and locations for notice posting under Board law.

As SDI admits, its Request for Review to the Board reiterates the facts and arguments it has already raised to the Regional Director and the General Counsel. *See* Standard Drywall’s Request for Review, p.4, n.3 (“the [argument section of the Request for Review] tracks the

reasoning submitted to the General Counsel in SDI's August 27, 2014 Appeal").¹ OPCMIA does not desire to further enlarge the record by restating the same detailed arguments it has already made in its October 2, 2014 submission to the General Counsel. Accordingly, OPCMIA attaches hereto and incorporates by reference its previous submission to the General Counsel. For the reasons set forth in OPCMIA's prior submission, as well as by the Regional Director in her August 7, 2014 compliance determination, the General Counsel in his December 24, 2014 decision affirming the Regional Director, and the Regional Director's Opposition to SDI's Request for Review, OPCMIA respectfully requests that the Regional Director deny SDI's Request for Review, or, in the alternative, affirm the decision of the General Counsel.

DATED: February 23, 2015

Respectfully submitted,

/s/

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¹ Notwithstanding SDI's failure to raise arguments that have not been previously considered, on February 20, 2015 the Regional Director filed a substantive and thorough Opposition to the Request for Review.

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October 2, 2014

Via Overnight Mail

Richard F. Griffin, Jr., General Counsel
Attn: Office of Appeals
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570

Re: *Operative Plasterers' & Cement Masons' Int'l Ass'n,*
Local 200 (Standard Drywall Inc.,
Case Nos. 21-CD-659, 660, 661, 673

Dear Mr. Griffin:

This office represents the Operative Plasterers' & Cement Masons' International Association ("OPCMIA" or "International Association"), which is a Respondent in the above-referenced cases. On August 27, 2014, Standard Drywall, Inc. ("SDI" or "Employer") filed an appeal with the Office of Appeals from the Regional Director's determinations in Case Nos. 21-CD-659, 660, 661 and 673 with respect to certain remedial issues. For the reasons set forth below, the OPCMIA respectfully requests that SDI's appeal be denied in its entirety.

I. BACKGROUND

SDI's appeal involves two Orders of the National Labor Relations Board ("Board") that have been enforced by the United States Court of Appeals for the Ninth Circuit. These orders are reported at *Operative Plasterer's & Cement Masons' Int'l Ass'n, Local 200*, 357 NLRB No. 160 (2011) and *Operative Plasterer's & Cement Masons' Int'l Ass'n, Local 200*, 357 NLRB No. (2011). Both orders require the OPCMIA and Plasterers Local 200 to reimburse SDI for litigation expenses and fees associated with the defense of specifically identified litigation. The remedy was based upon the Board's finding that the OPCMIA and/or Local 200 pursued that litigation even though those matters conflicted with a prior determination by the Board pursuant to Section 10(k) of the Act. The pertinent language of the orders is set forth below.

A. The Order in 357 NLRB No. 160

The first Order – which is reported at *Operative Plasterer's & Cement Masons' Int'l Ass'n, Local 200*, 357 NLRB No. 160, slip op. at 5 (2011) – contains separate provisions for the OPCMIA and Local 200. With respect to the OPCMIA, the order required, in relevant part:

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the petition to enforce the Kelly and Greenberg awards, and withdraw the request for a Plan complaint seeking the above described plastering work at public works projects in the 12 southern California counties performed by SDI employees represented by the Carpenters.

(b) Reimburse SDI for reasonable legal expenses and fees associated with the defense of the Kelly and Greenberg awards and the Plan after December 13, 2006, with interest as compounded in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Id. The Board's order contained similar provisions with respect to Local 200. These provisions include the following:

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the petition to enforce the Kelly and Greenberg awards, and withdraw the request for a Plan complaint seeking the above described plastering work at public works projects in the 12 southern California counties performed by SDI employees represented by the Carpenters.

(b) Withdraw the Pullen and Tortious Interference lawsuits.

(c) Reimburse SDI and Carpenters for reasonable legal expenses and fees associated with the defense of the Tortious Interference lawsuit after December 13, 2006 and SDI for reasonable legal expenses and fees associated with the defense of the Pullen Lawsuit, Kelly and Greenberg awards and the Plan complaint after December 13, 2006, with interest as compounded in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Nothing in the Board's order requires either the OPCMIA or Local 200 to reimburse SDI for its reasonable legal expenses and fees associated with any other proceeding, including the unfair

labor practice and/or compliance proceedings. SDI did not file a motion for reconsideration with the Board seeking any such additional remedies.

B. The Order in 357 NLRB No. 173

In the second Decision and Order, the Board issued an order requiring the OPCMIA and Local 200 to take certain affirmative action: *Operative Plasterer's & Cement Masons' Int'l Ass'n, Local 200*, 357 NLRB No. 173, slip op. at 4 (2011). With respect to both the OPCMIA and Local 200, the order required, in relevant part:

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the petition to enforce the Greenberg award.

(b) Reimburse SDI for reasonable legal expenses and fees associated with the defense of the Greenberg award and the Respondent's counterclaim in federal district court with interest as compounded in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Once again, the Board's order does not contain any provisions requiring either the OPCMIA or Local 200 to reimburse SDI for its reasonable legal expenses and fees for any other proceeding, including the unfair labor practice and/or compliance proceedings. And, yet again, SDI did not file a motion for reconsideration seeking any litigation fees and/or expenses for any other such proceedings.

II. SDI's APPEAL

Rather than file a motion for reconsideration after the Board announced the remedy and orders for the unfair labor practice charges, SDI simply waited until the compliance phase before it sought to enlarge the remedies. SDI asked the Regional Director to include tens of thousands of dollars that its counsel incurred as part of the unfair labor practice proceedings, the 10(1) proceedings, and the enforcement proceedings before the 9th Circuit. SDI even sought attorney's fees incurred for its attorneys' work during the compliance phase. The Regional Director denied all of these requests, finding, *inter alia*, that the Board's Order limited reimbursement to the matters specifically identified in the Orders.

SDI has filed an appeal with the Office of Appeals seeking to have the Regional Director's determinations set aside. More specifically, SDI is appealing the following determinations by the Regional Director:

(1) The Board's order does not include litigation expenses and fees incurred by SDI for:

- (a) the unfair labor practice proceedings, including the enforcement proceedings before the United States Court of Appeals for the Ninth Circuit and the compliance phase;
 - (b) the Section 10(l) proceedings in *Small v. Plasterers Local 200*, 611 F.3d 483 (9th Cir. 2010); and
 - (c) SDI's intervention in a proceeding before a state agency regarding the approval of an apprenticeship program for the United Brotherhood of Carpenters and Joiners of America ("UBC").
- (2) The OPCMIA is not required to post the Notices on its website because the International Association does not customarily communicate with its members through that site.

As explained in the next section, none of these arguments has any merit.

III. ARGUMENT

Proceedings before the National Labor Relations Board are taken under the National Labor Relations Act for the enforcement of public interests, not the adjudication of private rights. *National Licorice Co. v. NLRB*, 309 U.S. 350, 362-63 (1940). "The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act." *National Licorice Co.*, 309 U.S. at 363. "To that end, the Board is authorized to order the employer to desist from such practices, and by § 10(c) it is given authority to take such affirmative remedial action as will effectuate the policies of the Act. *Id.* In other words, the remedial action is not a private right, but a public right grant granted to vindicate the policies of the Act. *Phelps Dodge Corp v. NLRB*, 313 U.S. 177, 193-94 (1941); *State Journal*, 238 NLRB 388, 389 (1978).

A. SDI is Not Entitled to Litigation Expenses and Fees Incurred in Proceedings Other than those Specifically Identified in the Order

As noted in Section II, SDI argues that the Regional Director erred by not including litigation fees and expenses associated with proceedings *other than* the Pullen Lawsuit, the Tortious Interference Lawsuit and the Plan awards. The Employer's argument rests upon little more than a poor attempt at grammatical legerdemain. Clumsily juggling definitions to words such as "associated" and "defense," SDI argues that it is entitled to attorney's fees it incurred in the unfair labor proceedings, the Section 10(l) proceedings, and even the compliance proceedings. In other words, SDI is arguing that an order which reimburses SDI for reasonable litigation and expenses and fees incurred in the *defense* of certain actions is really one that also includes expenses and fees incurred during the *prosecution* of other cases. This argument borders on frivolity.

Indeed, the only way SDI could ever obtain reimbursement for litigation expenses and fees incurred during proceedings under the Act is if the Board found that the Respondents' defenses amounted to frivolous litigation. Board proceedings are governed by the "American Rule," *i.e.*, each party bears its own costs and fees for unfair labor practice proceedings. *See Heck's, Inc.*, 191 NLRB 886, 889 (1971). As the Board recognized in *Heck's, Inc.*:

... it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regard, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.

191 NLRB at 889.¹ In order to obtain litigation expenses and fees incurred during a proceeding under the Act, the party must prove – and the Board must find – that the respondent's defenses or conduct before the Board constitute frivolous litigation. *Tiidee Prods., Inc.*, 194 NLRB 1234, 1236-37 (1972). If it makes the finding, the Board then includes a specific paragraph in the order, such as the following:

(d) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

Id. at 1237. If the evidence fails to establish frivolous litigation, the Board denies the request for that remedy. *Condon Transp., Inc.*, 211 NLRB 297 (1974).

In this case, SDI never made such a claim in the unfair labor practice proceedings that it was entitled to its litigation expenses and fees incurred during those proceedings. When the Board issued its Orders in 357 NLRB No. 160 and 357 NLRB No. 173, which did not include a remedy for costs and expenses incurred during the investigation, presentation and conduct of the cases, SDI did not file a motion for reconsideration seeking those additional remedies. Instead, it proceeded to the Ninth Circuit, which enforced the Board's orders as written. Under the circumstances, SDI has waived any right to any litigation expenses and fees incurred during the unfair labor practice proceedings, the Section 10(l) proceedings, the enforcement proceedings, and the compliance proceedings.

¹ The "well-established principle that litigation expenses [incurred in Board proceedings] are ordinarily not recoverable," *id.*, reinforces the conclusion that the Board's orders in 357 NLRB No. 160 and 357 NLRB No. 173 do not include expenses incurred by SDI during the unfair labor practice proceedings or the Section 10(l) proceedings.

The Regional Director correctly determined that the Board's Orders require the OPCMIA and/or Local 200 to reimburse SDI for the reasonable litigation expenses and fees associated with the *defense* of those specific proceedings, *i.e.*, for the reasonable expenses incurred in the defense of the two state court lawsuits and in defense of the plan awards (including the lawsuit at issue in 357 NLRB No. 173). SDI's appeal – seeking any of the categories of fees outlined in Mr. Bennett's letter – should be denied in its entirety.

B. The Regional Director Correctly Concluded that the OPCMIA Does Not Have to Post the Notice on its Website

The Board's Orders in 357 NLRB No. 160 and 357 NLRB No. 173 require the OPCMIA and Local 200 to post the notice electronically *if* the Union *customarily* communicates with its members through electronic means. The language in both orders is identical:

(c) Within 14 days after service by the Region, post at its office and meeting halls copies of the attached Notice in English and Spanish, marked "Appendix A" In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site and/or other electronic means, if the Respondent customarily communicates with its members by such means....

357 NLRB No. 160, slip op. at 5; 357 NLRB No. 173, slip op. at 4. It is undisputed that the OPCMIA has complied with the physical posting requirements with respect to both orders.

The word "customarily" means "routinely." *See* Operations Memorandum 12-57, at 2 (May 24, 2014) (stating "if the investigation reveals that the charged party routinely communicates via postings on the intranet site or website or broadcast e-mails, it would be appropriate to seek an electronic posting or distribution remedy"). It also means regularly. Thus, the question is whether the OPCMIA routinely or regularly communicates with its members through its website, <http://www.opcmia.org>.

SDI attempts to show routine and regular communication by cherry-picking portions of particular pages. For example, "SDI submitted portions of the website pages which directly communicate with employees and members regarding topics such as the date and details of its national convention...." Letter from Mark Bennett to Richard Griffin at 8. The "national convention" occurs every five years and the "Convention Call," is published once every five years. Other blurbs on pages about heating oil and insurance, or about tools, does not establish that the OPCMIA ordinarily or routinely communicates with its members through its website.

A review of the website reveals that the principal purpose of the site is to market the OPCMIA to new members and contractors. There is a "members" tab; however, clicking on the tab gives rise to pages such as "Why Join?", "What are the Benefits?", and "How to Join – U.S." All of these pages are intended to recruit new members, not to communicate with existing

Richard F. Griffin, Jr., General Counsel
National Labor Relations Board
October 2, 2014
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members. Taken together with the pages for employers, the OPCMIA website is primarily used as a marketing tool for potential members and contractors.

Under the circumstances, the OPCMIA respectfully submits that the Regional Director correctly determined that electronic notice posting is not required. The OPCMIA respectfully requests that SDI's appeal in this regard be dismissed in its entirety.

Sincerely,

A handwritten signature in black ink, appearing to read "Bolek", with a stylized flourish at the end.

Keith R. Bolek
Counsel for the OPCMIA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 23, 2015, a copy of the foregoing Operative Plasterers' and Cement Masons' International Association's Opposition to Request for Review, with attachment, was filed electronically using the National Labor Relations Board's e-filing system. In accordance with Section 102.53(c) and 102.114 of the Rules and Regulations, a copy of the foregoing documents were electronically sent to the following:

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